No. 75-1364

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOSEPH BUGLIARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court and the court of appeals did not render any opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1976 (Pet. App. A 1a-2a). A timely petition for rehearing with suggestion for rehearing *en banc* was denied on February 26, 1976 (Pet. App. B 3a-4a). The petition for a writ of certiorari was filed on March 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government established a reliable figure for opening net worth in its tax evasion prosecution of petitioner.

2. Whether statements made by petitioner to special agents of the Internal Revenue Service during noncustodial interviews were properly admitted in evidence when the agents warned him of his constitutional rights only prior to the initial interview and not at the subsequent ones.

3. Whether evidence concerning petitioner's attempt to bribe a police officer at a time subsequent to the prosecution years was properly admitted into evidence.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of willfully attempting to evade taxes for the years 1970 and 1971, in violation of 26 U.S.C. 7201. The district court sentenced him to concurrent two-year prison terms on each count. The court of appeals affirmed without opinion (Pet. App. A 1a-2a).

The government used the "cash expenditures" method of proof to establish that petitioner had taxable income in amounts greater than that reported on his tax returns for the years in question. Petitioner's tax returns for 1970 and 1971 showed an aggregate of $9,000 in taxable income, allegedly derived from his activities as a salesman in 1970 and as the proprietor of a luncheonette from May—December, 1971, and a resulting tax liability of $1,500. The evidence, on the other hand, established that petitioner had a taxable income during those years of approximately $49,000, on which he owed $12,000 in income taxes. This was based on proof that during 1970 and 1971 petitioner incurred at least $49,000 of nondeductible expenditures, most of which were in cash (see, *e.g.*, Tr. 14-19, 25-35, 43-48, 51-57, 89-91, 103-121, 529).[1] During the investigation, petitioner

[1]"Tr." refers to the trial transcript.

stated to the special agents that he kept all of his money in the bank, that he had no cash on hand, and that he did not receive any gifts (Tr. 231-232, 229-230, 343-347).

The evidence also showed that respectively for 1970 and 1971, approximately $4,000 (more than $3,000 of which was in cash) and $6,700 (of which $5,300 was in cash) was deposited in a checking account in petitioner's wife's name (Tr. 186). Moreover, the bank records indicated that petitioner's wife, who was not employed during either 1970 or 1971 (Tr. 142), made weekly cash deposits of $150 to $200 during January—May 1971, a period when petitioner claimed to be unemployed (Govt. Exs. 31-31F).

Finally, the government also presented evidence that on February 11, 1972, petitioner was arrested when he paid $200 to a state police officer to drop the gambling arrest of Vincent Tarallo. In making this payment, petitioner told the officer that he was a "main cousin" —*i.e.*, someone well-known who makes a substantial share of illegal payoffs—and that he was there "to get this thing straightened out now" (Tr. 427-428; App. 15-16, 180).[2] When the police officer asked petitioner what he had previously been paying for protection, petitioner responded that he had been paying $125 per month (Tr. 428-429; App. 16-17, 181-182). With respect to this evidence the court cautioned the jury, both before (Tr. 420-422; App. 8-10) and after this testimony (Tr. 429; App. 17), as well as in its instructions (Tr. 786-787) that (Tr. 429; App. 17):

> We are not concerned in this case with any charge of alleged bribery which violates Federal or State law. The only purpose this is being received

[2]"App." refers to the record appendix in the court of appeals.

> for is to show that the government contends that the defendant had an interest in gambling activities. The government is going to urge upon you that this activity, if you believe it—and it is up to you whether or not you credit his testimony—reflects an interest in gambling activities as a source of income. We are not concerned with any aspect of the alleged bribery as such.

In defense, petitioner called his sister-in-law as a witness. She testified that in February 1969, just prior to her husband's (petitioner's brother's) death in April 1969, her husband gave $53,000 in cash to petitioner, asking petitioner to take care of his wife and children if anything should happen to him (Tr. 581-587). She stated that although petitioner took the money, he never gave her more than approximately $3,100 in return (Tr. 588-591).

In rebuttal to this testimony, the government introduced evidence that petitioner's sister-in-law and her husband had filed an affidavit in 1967 in a local court stating that they were unable to pay counsel fees in a civil trial (Tr. 624-626, 629). That civil case was subsequently settled upon their agreement to pay $400, with a $100 down payment and the remainder at the rate of $10 per week (Tr. 632-633). However, In March 1968, they defaulted on the payments and a judgment was obtained against them of approximately $600 to $700 in addition to what they had previously paid (Tr. 691-692). The judgment was finally collected in May 1970, when petitioner's sister-in-law sold her home (Tr. 692-693). There was also evidence that at the time of petitioner's brother's death in April 1969, the brother owed $816 to a hospital, no part of which was ever paid (Tr. 681).

ARGUMENT

1. As petitioner acknowledges (Pet. 14), the net worth method of proving criminal tax evasion has long been approved by the decisions of this Court. See, *e.g., Holland* v. *United States,* 348 U.S. 121. Under this method, the government is permitted to introduce evidence of the defendant's yearly increases in net worth which, with appropriate adjustments, is proof of the correct measure of taxable income. Although petitioner claims (Pet. 16) that there was an "utter lack of any accurate evidence of unreported income for either tax year in question," this is nothing more than a general complaint against the net worth method, the validity of which he concedes.

Here, the government used the "cash expenditures" variation of the net worth method and petitioner does not argue that its use in this case was inappropriate. He argues (Pet. 16-17) that the net worth computation was erroneous because the government did not establish a reliable figure for cash on hand at the beginning of 1970. In so arguing, petitioner alleges that there was no corroboration of his 1973 admission that he kept all of his money in the bank, that he had no cash on hand, and that he did not receive any gifts.

However, the evidence showed that agents of the Internal Revenue Service had canvassed court records, banks and brokerage houses, and had examined federal gift tax returns. This investigation established that petitioner had not received any gifts or bequests which could have been sources for the expenditures (Tr. 205-207). Thus petitioner's statement that he had virtually no cash on hand was corroborated by those records.

Moreover, the correctness of petitioner's statement was confirmed by the evidence, which discredited the claim that the expenditures were made from a "cash hoard" of $53,000 that petitioner had received from his brother. From the evidence that petitioner's brother and sister-in-

law had stated in 1967 that they were financially unable to pay counsel fees, that they had defaulted on a $400 judgment in 1968, and that they owed a $816 hospital bill in 1969, which was never paid, the jury could properly infer that petitioner's brother had not amassed a $53,000 cash hoard and that his sister-in-law's testimony that her husband gave petitioner that amount of money was false. When coupled with the statement he made in 1973 that he had virtually no cash on hand, the jury was amply justified in concluding that the government's zero cash on hand figure for the beginning of 1970 was reliable. Cf. *United States* v. *Bianco,* C.A. 2, No. 75-1244, decided April 8, 1976, slip op. 3102-3105.

2. Petitioner also argues (Pet. 17-22) that his statements to the special agents after the initial interview as to cash on hand should have been suppressed since they warned him of his constitutional rights only prior to the initial interview and not at the subsequent ones.[3]

Contrary to petitioner's implicit assumption, the conduct of the special agents in the case was in complete conformity with the announced procedures of the Internal Revenue Service. On November 26, 1968, the Service announced (see I.R.S. News Release IR-949 (1968 C.C.H. Stand. Fed. Tax Rep., par. 6946)) that henceforth its special agents were required upon *initial* contact with the taxpayer to give certain warnings of rights, including the right to remain silent and the right to

[3]Petitioner did not object when the special agent testified with respect to these statements. Thus, the district court properly concluded that petitioner's motion to strike the testimony, made during cross-examination of the agent (Tr. 237), was untimely, because petitioner was well aware of the fact that he received no warnings after the first interview and possessed documentary confirmation of that fact (Tr. 243-244). *United States* v. *Blackwood,* 456 F.2d 526, 529 (C.A. 2), certiorari denied, 409 U.S. 863.

counsel. Under the previous procedure, special agents were only required to produce their credentials upon initial contact and advise the taxpayer that they were charged with investigating criminal tax fraud (see I.R.S. News Release 897 (1967 C.C.H. Stand. Fed. Tax Rep., par. 6832)). The earlier news release also noted that if the potential criminal aspects of the matter were not resolved by preliminary inquiries and further investigation became necessary, the special agents were required to advise taxpayers of their right to remain silent and to retain counsel.

Petitioner argues (Pet. 18-19) that the two news releases must be read together. In his view, the provision of the first news release requiring agents to advise taxpayers of their right to remain silent and to counsel if preliminary inquiries did not resolve the potential criminal aspects of the matter requires that the warnings be given prior to all interviews because the second news release is silent as to all contacts with the taxpayer after the initial contact. But the second news release announced that there had been a "change" in the procedure, *i.e.,* that the special agents would advise as to the right to remain silent and to counsel at the first contact rather than after the agent determined that preliminary inquiries had not resolved the potential criminal aspects of the case. The second announcement thus superseded the first procedure in all respects.

Indeed, the purpose of the second procedure was to insure that the taxpayer would receive the warning at the initial interview; not to require that the warning be given prior to all interviews. Since it is undisputed that the agents gave petitioner the warning prior to the first interview, this case does not present the question whether, contrary to petitioner's assertion (Pet. 20-21), statements made by a taxpayer to special agents at a non-

custodial interview when the agents have not followed the prescribed warning procedure at the initial interview are admissible. See *United States* v. *Heffner*, 420 F.2d 809 (C.A. 4); *United States* v. *Leahey*, 434 F.2d 7 (C.A. 1); *United States* v. *Sourapas*, 515 F.2d 295 (C.A. 9). *Contra: United States* v. *Leonard*, 524 F.2d 1076 (C.A. 2), certiorari denied, May 3, 1976 (No. 75-1016); *United States* v. *Gentile*, 525 F.2d 252 (C.A. 2). Cf. *Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976.

3. Finally, petitioner contends (Pet. 22-23) that the evidence of his involvement in gambling and of his arrest for bribery of a police officer was highly prejudicial. But this evidence was probative of a likely source of taxable income and, hence, admissible. The trial judge carefully instructed the jury of the limited purpose for which this evidence was admitted, *i.e.*, to show a likely source of taxable income. See, *e.g.*, *United States* v. *Eliano*, 522 F.2d 201 (C.A. 2); *United States* v. *Vario*, 484 F.2d 1052 (C.A. 2), certiorari denied, 414 U.S. 1129; *United States* v. *Marquez*, 332 F.2d 162 (C.A. 2).

The bribery incident in question occurred less than two months after the close of 1971, the last taxable year at issue. At that time petitioner stated that he had been paying $125 per month for protection of his gambling business. In the light of the additional evidence that petitioner's wife made weekly bank deposits of $150-$200 during a period of 1971 in which he was supposedly unemployed and petitioner's inability to identify his employer for 1970 (Tr. 211), the jury could have concluded that the source of petitioner's cash expenditures during 1970 and 1971 was unreported income from gambling.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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